Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIGUEL MEDRANO,

Petitioner,

v.

EXCEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul Alan Levy.
(*Counsel of Record*)
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Kevin Glasheen
1115-A Broadway
Lubbock, Texas 79401
(806) 741-0284

Attorneys for Petitioner

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QUESTION PRESENTED

Is a state law claim that an employer's collectively bargained policy violates state law, because it punishes workers who file successful workers' compensation claims, preempted by section 301 of the Labor-Management Relations Act, which federalizes all suits "for violation of" a collective bargaining agreement, on the theory that, to decide whether the collective bargaining agreement is illegal, the court must look at the agreement?

LISTING OF PARTIES IN THE COURT BELOW

The names of all parties to the proceeding in the court of appeals appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Miguel Medrano petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 985 F.2d 230, and appears in the Appendix to this Petition at 1a to 9a (App. 1a-9a). The district court did not issue any opinions addressing the issue of preemption, but implicitly rejected respondent's preemption argument in denying

respondent's motion for judgment notwithstanding the verdict. App. 10a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1993. App. 1a-9a. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Article 8307c of the Texas Revised Civil Statutes Annotated provides as follows:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workers Compensation Act, or has testified or is about to testify in any such proceeding.

> Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

STATEMENT

A. Facts.

Petitioner Miguel Medrano was employed as a meat cutter in a packing plant operated by respondent Excel Corporation in Plainview, Texas. He was employed in a bargaining unit represented by Local 540 of the United Food and Commercial Workers, and the terms and conditions of his employment were regulated by a collective bargaining agreement ("CBA") between respondent and Local 540, as well as by various state and federal laws.

In November 1989, petitioner injured his wrist and shoulder at work. His treating physicians imposed various restrictions on his return to work, which prevented him from working for nearly a year. Petitioner filed workers' compensation claims, and began to receive weekly benefits for temporary injuries.

He returned to work in October, 1990, and was assigned to an extremely arduous job which, according to his testimony, required him to do by himself a job that would ordinarily have been done by two people. Petitioner again experienced difficulty from his injuries, and on November 13, 1990, his physicians imposed temporary restrictions, pending the completion of certain tests, pursuant to which he was taken off work.

On November 28, 1990, petitioner settled his workers' compensation claims and received a lump sum settlement for limited but permanent injuries. Following the completion of his medical tests, petitioner's physician gave him a release to return to work. The evidence was conflicting on whether, at that point, there were jobs available within the plant that petitioner could have performed. In any event, when he attempted to return to work on January 16, 1991, petitioner was immediately terminated because he had settled his workers' compensation claim.

Article XVII, Section 11(D) of the CBA provides that employees could be off work, for injuries or for other reasons, for as long as eighteen months without losing their jobs. However, under Article XVII, Section 11(F), an employee who entered a "full settlement . . . for a disability that the Company cannot accommodate" loses his job immediately. At trial, respondent's representatives conceded that the combined effect of these two provisions was to allow injured workers as long as eighteen months to recuperate sufficiently to be able to perform work at the plant; but if such workers obtained workers' compensation settlements, they would have to be ready to work immediately upon settlement or face termination.

The CBA provided a grievance and arbitration procedure for resolution of disputes between the parties. However, strict limits were imposed on the arbitrator, who "shall not have authority other than to apply terms and conditions specifically set forth in this Agreement." Article XVIII, Section 1, Fourth.

B. Proceedings Below.

On December 13, 1990, petitioner and thirty-seven other Excel employees filed an action against respondent in the United States District Court for the Northern District of

Texas, Lubbock Division, alleging that respondent had engaged in a pattern of harassment, discrimination and retaliation against employees who exercised their rights under the Texas Workers Compensation Act, in violation of Tex. Rev. Civ. Stat. Ann. art. 8307c. The actions were severed, and petitioner proceeded individually with his claim of retaliatory discharge under article 8307c. Respondent defended on the ground that it was simply following the CBA in firing petitioner, Answer to Second Amended Complaint, Docket No. 78, at 4, and sought summary judgment on that ground. Docket No. 92, at 3, 4. After summary judgment was denied, the case went to trial.

Rather than waiting for respondent to put its CBA-based defense before the jury, petitioner met the defense head-on in his case-in-chief, arguing that respondent's general policy regarding the reinstatement of injured workers, based on whether they demanded workers' compensation settlements, was itself a form of unlawful discrimination in violation of article 8307c. On several occasions, management witnesses were asked whether it was true that, as the CBA seemed to state, injured workers who did not demand settlements could take eighteen months to return to work without losing their places in the plant, while injured workers who did demand such settlements would have to be able to come back to work immediately or lose their jobs. On each occasion, the witnesses conceded that this was an accurate statement of management policy, although they denied that this constituted retaliation. Respondent put on other evidence to try to show that it did its best to accommodate injured workers, whether or not they sought workers' compensation benefits. This evidence, in turn, was disputed by petitioner.

After a three-day trial, the jury returned a verdict of $60,000 in favor of petitioner and against respondent. Respondent then moved for judgment notwithstanding the verdict, in which it repeated its argument, made by motion to dismiss during the trial, that because petitioner was

attacking a discriminatory policy that was reflected in a CBA, his claim was preempted by section 301. This motion was denied without opinion by the district judge. App. 10a.

On appeal, respondent reiterated its contention that, by overtly attacking the CBA at trial, petitioner had transformed his state law claim into one that was completely preempted by section 301. Petitioner argued, for his part, that respondent could not shield an illegal employment policy from state law attack by the simple expedient of incorporating it into a CBA. The effect of respondent's preemption defense, petitioner pointed out, would be to permit employers to contract for something illegal under state law, in flagrant contravention of this Court's precedents in *Lingle v. Norge*, 486 U.S. 399 (1988), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

The Fifth Circuit reversed. It began by acknowledging that this Court has held that tort claims may be brought by employees against employers so long as the state law claim is not "inextricably intertwined" with consideration of the terms of the CBA. App. 5a. It also recognized that, in some circumstances, an employee may proceed on a claim of retaliatory discharge under art. 8307c without running afoul of section 301 preemption, because such a claim depends on the employer's motive for the discharge, and the question of motive is normally independent of the CBA. *Id.* 7a. But here, the court decided, "Medrano was essentially challenging the very legality of Article XVII, Section 11(F), of the CBA, which Excel had faithfully applied and which was the basis for Medrano's termination." *Id.* The case was thus deemed unlike the situation in other retaliatory discharge cases, which turn on the legality of the motive for a single discharge. "What is disputed in this case is whether the **provision itself** was illegal or discriminatory." *Id.* 8a (emphasis in original). Citing a Fifth Circuit precedent that forbade state law claims directed against the enforcement of provisions of a CBA, the court concluded that it was impossible to decide whether the

provision itself was illegal without examining the provision, and such examination caused the state law claim to be preempted by section 301. *Id.* The court did not, however, explain what forum would be available to hear the claim that the CBA violated state law, in light of the limitations placed by the CBA itself on the authority of an arbitrator to resolve contractual grievances.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Prior Decisions of This Court Holding That Employers May Not Use Collective Bargaining to Contract For What Is Illegal Under State Law, and the Lower Courts Are in Broad Disarray In Determining How Much Examination of Collective Bargaining Agreements Requires a Finding of Preemption Under Section 301

1. This Court has held that all claims that seek to enforce a collective bargaining agreement arise under section 301 of the LMRA, even if the plaintiff purports to bring the claim under state law. *Avco Corp. v. Machinists*, 390 U.S. 557 (1968); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court ruled that an employee cannot avoid the preemptive effect of section 301 simply by using a tort label to describe a claim that, in effect, seeks to enforce duties created by a CBA.

But *Allis-Chalmers* also insisted that the mere fact that an employer has entered into a CBA to govern its employees' terms and conditions of employment does not serve to immunize the employer from claims seeking to enforce state law rights that are independent of any right established by contract. 471 U.S. at 212. Section 301 did not "give the substantive provisions of private agreements the force of

federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* Nor must the state claim be completely unrelated to the CBA; it must only be "sufficiently independent of the CBA to withstand to pre-emptive force of § 301." *IBEW v. Hechler*, 481 U.S. 851, 859 (1987).

In *Lingle v. Norge,* 486 U.S. 399 (1988), the Court made clear the limits of the preemption doctrine enunciated in *Allis-Chalmers*. Some lower courts had understood *Allis-Chalmers* to stand for the proposition that any state law claim brought by a unionized employee was necessarily dependent on the CBA, if there existed parallel rights in the CBA and a grievance procedure for enforcing them. In *Lingle*, as in this case, the employee claimed that she had been fired for exercising her right to file a workers' compensation claim, and the Court held that the mere existence of a CBA with an arbitration clause was not sufficient to preclude the states from providing an independent cause of action to employees who were terminated for a reason deemed by the state to be contrary to public policy. The Court held that state law tort claims are preempted only to the extent that they are dependent on the meaning of a CBA, and the fact that a CBA may contain a clause that provides rights parallel to the state claim does not make the state law claim "dependent" on the CBA. 486 U.S. at 408-410. The Court went on to observe that it was possible for a state law claim to require some reference to a CBA without being preempted:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a CBA and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but

> the state law analysis would not thereby be preempted.
>
> 486 U.S. at 413 n.12.

The decision below construes *Lingle*'s statement of the standard for determining whether a state law claim is preempted by section 301, as **eliminating** *Allis-Chalmers*' insistence that section 301 does not enable employers to use a union contract to override state law regulations with which they disagree. Although this confusion is shared by many courts, *see* Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 593-620 (1992), it is plainly not what the *Lingle* Court intended. Indeed, *Lingle* was the first case in which this Court held a state law claim **not** preempted by section 301, and it did so by cutting back the expansive view of preemption adopted by many lower courts.

Under the decision below, employers that are forbidden by Texas law from discriminating against workers' compensation claimants may insulate themselves from retaliatory discharge claims by writing provisions allowing discrimination into their CBA's; under that analysis, no party may sue under state law to challenge the lawfulness of such provisions. And, because the CBA here, like most CBA's, limits the arbitrator to construing the CBA itself, and does not give him license to base his decision on public law that may contradict the agreement, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), there is no forum to which an employee may bring his claim that the CBA violates state law.

This Court has long held that the system of collective bargaining concerning the terms and conditions of employment does not supplant minimum employment standards that the states may choose to impose. *E.g.*, *Terminal RR Ass'n v. Brotherhood of RR Trainmen*, 318 U.S.

1, 6-7 (1943); *Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978). The Fifth Circuit's contrary ruling threatens to expose all such state laws to preemption whenever an employer is able to overrule them in a CBA. The Court should grant certiorari in this case to protect the rights of the states to legislate free of private veto.

2. In cases of preemption, "the ultimate touchstone" is Congressional intent. *Allis-Chalmers, supra*, 471 U.S. at 208. Given the respect due the states in our federal system, there is a strong presumption against finding Congressional intent to preempt state law, "unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981). However, not only did the court below fail to consider whether Congress intended to preclude Texas from providing a cause of action against retaliatory discharge to a worker whose CBA permitted such retaliation, but in fact there is strong evidence that Congress did not so intend.

The basis for preempting petitioner's state cause of action was that the respondent "had faithfully applied" its CBA, and a state law claim may not be brought to challenge the legality of a provision of a CBA. App. 7a. If one of the questions in the case was whether respondent had, in fact, faithfully applied the CBA, it would be wholly natural to construe section 301 to preempt at least that part of the state claim, and maybe all of it, because section 301 makes suits "for **violation** of" CBAs a question of federal law. But the mere fact that a state law may **invalidate** a provision of a CBA is no basis for finding preemption by section 301.

In fact, many federal statutes forbid retaliatory discharge and otherwise regulate the treatment of employees, and, either by their express terms or under longstanding interpretations, those laws override contrary provisions in private agreements, either collective or individual. *E.g.*,

Jewell Ridge Coal Corp. v. UMW Local 6167, 325 U.S. 161, 167 (1945) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (Title VII of the Civil Rights Act of 1964); *Laffey v. Northwest Airlines*, 567 F.2d 429, 447 (D.C. Cir. 1976) (Equal Pay Act). The same Congress that enacted section 301 in 1947 also passed the Selective Service Act of 1948, whose protections for the reemployment of veterans could be enforced by civil actions even contrary to claims that other workers might assert under CBAs. Pub. L. No. 62-759, Title I, § 9, 62 Stat. 614-618. Congress has also been scrupulous to avoid federal preemption or other disruption of state workers' compensation systems. *E.g.*, Occupational Safety & Health Act, 29 U.S.C. § 653(b)(4); Employee Retirement Income Security Act, 29 U.S.C. § 1003(b); 28 U.S.C. § 1445(c) (barring removal of workers' compensation claims); 26 U.S.C. § 104(a)(1) (excluding workers' compensation benefits from taxable income).

State workers' compensation laws similarly forbid private agreements, whether collective or otherwise, from overriding the workers compensation system. 4 Harper, James & Gray, *The Law of Torts* § 21.6 at 253 (2d ed. 1986); Texas Rev. Civ. Stat. Ann., art. 8308-3.09. Indeed, it was a concern that the threat of retaliatory discharge might grow into a device to compel employees to reassume the risks of industrial accidents that led many states to provide a cause of action in tort for retaliatory discharge and to forbid collectively bargained waiver of this right as well. *See Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 503 N.E.2d 308, 312 (1986). Texas was the first state to adopt a comprehensive approach to this problem, 2A Larson, *The Law of Workmen's Compensation* § 68.36(a), at 13-182 (1992), and one of the first to hold that claims could be pursued independent of the collectively bargained grievance procedure. *Richards v. Hughes Tool Co.*, 615 S.W.2d 196 (Tex. 1981); *Bonner v. Fleming Co.*, 734 S.W.2d 764 (Tex. App. 1987).

But the problem of preemption will not be limited to workers' compensation laws, if the Fifth Circuit's decision is permitted to stand. For example, many states, particularly within the Fifth Circuit, have laws -- so-called "Right to Work" legislation -- that forbid unions and employers from including in their CBA a union security clause that requires employees to join a union as a condition of employment. This subject has been the focus of bitter debate at both state and federal levels, and the National Labor Relations Act ("NLRA") allows some such agreements, but not others. 29 U.S.C. §§ 158(a)(3), 164(b). Yet under the preemption doctrine adopted by the Fifth Circuit here, a state law claim alleging that the employer has entered into a union security clause forbidden by that state's "Right to Work" law would be preempted by section 301 because the courts could not decide whether the clause was illegal without interpreting the clause.

Similarly, many states have civil rights laws that extend beyond the federal anti-discrimination statutes, such as by invalidating discrimination based on additional categories (such as family status or sexual orientation), or by extending protection to additional categories of employers (such as smaller businesses) and workers (such as persons with disabilities not recognized under the Americans with Disabilities Act). Existing precedent permits employees to challenge provisions of CBAs under such laws. *E.g.*, *Bald v. RCA Alascom*, 569 P.2d 1328 (Alaska 1977); *Franklin Mfg. Co. v. Iowa Civil Rights Comm.*, 270 N.W.2d 829 (Iowa 1978). *See also Beckwith v. United Parcel Service*, 889 F.2d 344, 346-348 (1st Cir. 1989) (Maine statute allowing challenge to payroll deductions expressly authorized by CBA, held not preempted by NLRA).

Under the Fifth Circuit's holding below, an employer that was able to persuade the union to endorse its prejudices would be able to insulate itself from review under state law. Indeed, the circuits are in disarray about the extent to which a claim under a state civil rights law may be pursued against

a unionized employer who asserts that the CBA provides the explanation for its action against the employee. *Compare O'Brien v. Conrail*, 972 F.2d 1 (1st Cir. 1992), *with O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989).

Accordingly, the decision below poses a severe threat to the right of states to protect their citizens against abuses by employers whose collective bargaining position is strong enough to win CBA provisions that purport to counteract state minimum employment standards. The Court should grant review to consider the important question of whether the preemptive effect of section 301 reaches that far.

3. The question of whether federal labor law, in conjunction with the "just cause" and comparable provisions contained in most collective bargaining agreements, preempts the application of general state laws against retaliatory discharges to unionized employees, is one that has vexed the lower courts and produced sharply conflicting results. For example, several courts have refused to preempt state law claims of retaliation for filing workers' compensation claims, brought by employees who were either discharged or laid off for their failure or inability to return to work within the time permitted by the CBA. *See Peabody Galion v. Dollar*, 666 F.2d 1309, 1312 (10th Cir. 1981); *Puchert v. Agsalud*, 677 P.2d 449, 452, 453-455 (Haw. 1984), *app. dism. for want of substantial federal question sub nom. Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985). Similarly, in *Machinists District 190 v. Utility Trailer Sales Co.*, 141 Cal. App. 3d 80, 100, 190 Cal. Rptr. 98 (1983), *app. dism. for want of substantial federal question*, 464 U.S. 1005 (1983), the employee sued to enforce a state law requiring employers to indemnify employees for lost tools; the court refused to preempt the claim even though an arbitrator had held, rejecting the employee's grievance under the CBA, that the employer could decide not to provide such reimbursement. Not only do these cases stand in opposition to the ruling of

the Fifth Circuit here, but this Court's affirmances for want of a substantial federal question in *Utility Trailer* and *Puchert*, rejecting appeals in which the employers claimed preemptive power for the CBA, are themselves binding precedents with which the decision below conflicts.

The foregoing cases are pre-*Lingle* and (except *Puchert*'s affirmance) pre-*Allis-Chalmers*, but these two cases have not succeeded in putting an end to the differences among the lower courts on the question of distinguishing between state law claims that are and are not preempted under section 301. Thus, for example, the lower courts continue to grapple with the question of whether state claims are preempted when the employer raises the CBA as a defense to the otherwise independent state law claim. In such cases as *McCormick v. AT & T Technologies*, 934 F.2d 531, 536 (4th Cir. 199) (*en banc*), courts have indicated that an employer can secure the preemption of a state law claim by claiming that the CBA gave it the legal right to act against the employee. Similarly, in *Utility Workers v. Southern Calif. Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), the court held that a state privacy claim was preempted because the CBA had to be consulted to determine whether the union had bargained away the employees' privacy rights. As Professor Stone has observed, the effect of such decisions as these is to allow the mere assertion of a CBA-related defense to extinguish the state law right by "automatic[] preempt[ion]," with no check on the validity of the CBA-related claim. 59 U. Chi. L. Rev at 604, 606.

Other courts have firmly refused to permit the mere assertion of a CBA-related defense to cause the preemption of the underlying state cause of action, where it was decided that the state law claim could, at least in theory, be resolved without considering the CBA. *Pantoja v. Texas Gas & Trans. Corp.*, 890 F.2d 955, 960 (7th Cir. 1989); *Eldridge v. Felec*, 920 F.2d 1434, 1439 (9th Cir. 1990). And some courts have held that, even if a CBA-based defense might be available in theory, the CBA itself should be scrutinized to

determine whether such a defense is available. *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988), *after remand*, 906 F.2d 341 (8th Cir. 1990).

Still other courts have striven for a middle course, which would honor this Court's statement in *Lingle* that defenses dependent on the meaning of the CBA could be resolved by federal law procedures, while the basic state law claim would not be preempted. 486 U.S. at 413 n.12. Thus, one court remanded a case to arbitration to determine whether a CBA waived the state law right, stating that the state claim could proceed if this federal law procedure determined that the CBA defense was invalid. *Matter of Chicago, Milwaukee RR Co.*, 852 F.2d 960, 967-968 (7th Cir. 1988). *See also Dougherty v. Parsec*, 872 F.2d 766, 770-771 (6th Cir. 1989) (after arbitrator decided CBA not violated, court could decide remaining tort issues). Another court held that a state age discrimination claim could not be removed to federal court on complete preemption grounds, while indicating that, in the state court on remand, some issues in the case would be preempted by federal law. *Machinists v. General Electric Co.*, 713 F. Supp. 547, 554 (N.D.N.Y. 1989).

Petitioner's attack on the CBA was undertaken in anticipation of respondent's CBA defense. If, as many lower courts have held, the mere possibility of a CBA-related defense is not a sufficient reason to preempt a state law claim, then the fact that the CBA provision on which the defense is founded itself violates state law because it calls for the very retaliation or discrimination that the state forbids, should certainly not put the employer in a stronger position to contest the application of state law. In reviewing this case, therefore, the question of automatic preemption by CBA-related defenses will be well within purview of the Court's consideration.

Controversy has also arisen among the lower courts about whether claims for intentional infliction of emotional

distress are preempted. Many circuits have routinely held such claims preempted on the theory that a court cannot decide whether conduct was truly outrageous without determining precisely what the CBA allowed. *E.g.*, *McCormick v. AT&T Technologies Corp.*, 934 F.2d 531 (4th Cir. 1991) (*en banc*); *Johnson v. Beatrice Foods*, 921 F.2d 1015 (10th Cir. 1990). Other courts have adopted a more painstaking analysis, examining CBAs to determine whether they do, in fact, provide some justification for the employer's action, and consequently denying preemption of some intentional infliction claims. *E.g.*, *Galvez v. Kuhn*, 933 F.2d 773, 779-780 (9th Cir. 1991); *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990); *Knafel v. Pepsi-Cola Bottlers*, 899 F.2d 1473, 1483 (6th Cir. 1990).

Even state anti-discrimination laws have not always been held to be enforceable over claims of preemption. Thus, in *O'Brien v. Conrail*, 972 F.2d 1 (1st Cir. 1992), the court held that the CBA must be consulted to determine whether a disability discrimination plaintiff is qualified for particular jobs, and thus whether a prima facie case of discrimination can be established, citing decisions of several other lower courts taking the same position. By contrast, *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989), allows such claims to proceed

The broader questions identified above are not squarely presented here, and we do not suggest that this is the right case in which to resolve all of them. But this widespread disagreement shows that the lower courts are struggling to apply the preemption rules established by this Court in *Allis-Chalmers* and *Lingle*. In fact, courts and commentators alike have noted the highly confused state of preemption law in this respect. *E.g.*, *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991); Note, *The Need for a New Approach to Federal Preemption of Union Members' State Claims*, 99 Yale L.J. 209 (1989).

The time is ripe for the Court to revisit the issue of section 301 preemption. The preemption question here is narrow, because the CBA is relevant only because petitioner contends that it was contrary to state law. But what this case has in common with the issues presented in these other preemption controversies is the question whether **any** need to consult the CBA is sufficient to warrant preemption, or whether a claim is preempted only if the plaintiff is trying to enforce duties founded in the CBA itself. Thus, the case presents an opportunity to speak once more to the troubled area of section 301 preemption and to begin the process of laying the intra-circuit conflicts to rest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(*Counsel of Record*)
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Kevin Glasheen
1115-A Broadway
Lubbock, Texas 79401
(806) 741-0284

Attorneys for Petitioner

June 7, 1993

Miguel MEDRANO, Plaintiff-Appellee

v.

EXCEL CORPORATION,
Defendant-Appellant

No. 91-7385

U.S. Court of Appeals,
Fifth Circuit

March 9, 1993

Kevin Glasheen, Sam L. Fadduol, Lubbock, TX for plaintiff-appellee.

Robert M. Cohan, Linda S. Althoff, Suzanne R. Westerheim, Cohan, Simpson, Cowlishaw, Aranza & Wulff, Dallas, TX, for defendant-appellant.

Appeal from the U.S. District Court for the Northern District of Texas.

Before JOLLY and WIENER, Circuit Judges, and FITZWATER, District Judge.*

JOLLY, Circuit Judge: -- This appeal presents a little twist in the basic question of whether a state claim for retaliatory discharge under workers' compensation law is pre-empted pursuant to a collective bargaining agreement. Our plaintiff and appellee, Miguel Medrano, sustained work-related injuries and filed two workers' compensation claims, both of which he settled. On the date of the settlement, he was still under medical restrictions relating to work duties

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* District Judge of the Northern District of Texas, sitting by designation.

that could not be accommodated by his employer, Excel Corporation. Applying the terms of a collective-bargaining agreement (CBA), Excel terminated Medrano's employment. Medrano -- asserting diversity jurisdiction -- filed a wrongful discharge complaint against Excel. In his complaint, Medrano alleged that Excel discharged him in violation of article 8307c of the Texas Workmen's Compensation Act. Medrano alleged that Excel's alleged reliance on the CBA as the reason for discharge was a mere pretext, and that Excel really terminated him in retaliation for filing a workers' compensation claim. Things changed, however, at the outset of the trial. Once the trial began, Medrano argued that the provision of the CBA itself constituted discrimination in violation of article 8307c. Excel then argued to the district court that Medrano's claim, as presented at trial, was pre-empted by section 301 of the Labor Management Relations Act (LMRA). Excel was unsuccessful, however, in obtaining, first, a leave to amend its answer, and then in obtaining a directed verdict, a judgment notwithstanding the verdict (JNOV), or a new trial -- all based on federal pre-emption of Medrano's state law claim. The $60,000 jury verdict for Medrano was entered as the judgment of the court, and Excel appeals.

I

Excel employed Medrano as a butcher at its Plainview, Texas, meat packing plant in June 1989. During November of that year, Medrano suffered injuries to his left wrist, his right arm, and his right shoulder. As a result of his injuries, Medrano was unable to work for a substantial part of 1990. Medrano filed two workers' compensation claims and collected weekly compensation benefits.

Medrano returned to work on October 5, 1990, with the restriction that he could not use a knife or hook for more than 65% of the time. Medrano was still recovering from his shoulder injury, which restricted him to light duty for four months. On November 12, however, Medrano's doctor

determined that his current position was too stressful to his shoulder and further restricted Medrano's work conditions. On November 13, Medrano was medically prohibited from all use of knives or hooks. On November 28, 1990, Medrano settled his two workers' compensation claims for approximately $27,000.00. On this date, there were no jobs available at Excel that could accommodate[1] Medrano's medical restrictions.

On December 13, 1990, Medrano and thirty-seven other Excel employees filed suit against Excel, alleging harassment, discrimination, and retaliation in violation of Tex.Rev.Civ.Stat.Ann. art. 8307c, the Texas Workmen's Compensation Act. On January 11, 1991, Excel informed Medrano that his employment was terminated pursuant to Article XVII, Section 11(F), of the collective-bargaining agreement (CBA) between Excel and the United Food and Commercial Workers District Local #540. This settlement provision states that an employee shall lose his seniority for full settlement for a disability that the company cannot accommodate. The district court subsequently severed the claims of the thirty-eight plaintiffs in the previously filed lawsuit. Medrano amended his complaint, dropping the harassment claim.

Medrano's retaliatory discharge action was tried before a jury. On the second day of trial, Excel moved for leave to file a trial amendment asserting that Medrano's claim was pre-empted by federal labor law. Medrano's complaint alleged that the settlement provision in effect when he settled his workers' compensation claims was merely a pretext for his termination; instead, Excel had terminated him in retaliation for exercising his rights under the Texas

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[1] Specifically, Article XVII, Section 11(F), provides that "[a]n employee shall lose his seniority for the following reasons: Full settlement with an employee for a disability that the Company cannot accommodate."

Workmen's Compensation Act. Excel argued, however, that beginning with the trial, Medrano had changed his position: He was now arguing that the settlement provision of the CBA itself constituted discrimination against employees who settled their workers' compensation claims. This claim, Excel argued, was pre-empted by section 301 of the Labor Management Relation Act (LMRA). Excel's motion to plead pre-emption, however, was denied. At the close of Medrano's case-in-chief, Excel moved for a directed verdict, again arguing that Medrano's claim -- as presented at trial -- was pre-empted by federal law. The district court, however, rejected Excel's argument.

On October 25, 1991, the jury found for Medrano. It concluded that Excel had terminated Medrano in retaliation for his pursuit of workers' compensation benefits. On November 8, 1991, Excel filed motions for a JNOV and for a new trial, again arguing that Medrano's claim was pre-empted by section 301; again, both motions were denied by the district court. On November 26, 1991, the district court entered judgment in favor of Medrano in the amount of $60,000.00. Excel appeals.

II

On appeal, Excel raises three issues. First, Excel argues that Medrano's claim of retaliation, as presented to the jury, was pre-empted by section 301 of the LMRA. Second, Excel argues that Medrano failed to present evidence to support the jury's verdict. Third, Excel argues that Medrano failed to present evidence to support an award of exemplary damages.

On the other hand, Medrano first argues that Excel has failed to preserve its claim of pre-emption for appeal; if the issue has been preserved, Medrano argues that his claim is not pre-empted. Medrano also defends his jury award against Excel's evidentiary attack.

III

A

Section 301 of the LMRA states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Any state law cause of action for violation of a collective-bargaining agreement is entirely displaced by federal law under section 301. *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 368, 110 S.Ct. 1904, 1909, 109 L.Ed.2d 362 (1990). Furthermore, state law is pre-empted by section 301 "in that only the federal law fashioned by the courts under section 301 governs the interpretation and application of collective-bargaining agreements." *Id.* A tort claim "inextricably intertwined" with consideration of the terms of the collective-bargaining agreement contract is pre-empted under section 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213,105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). If, however, the state-law claim can be resolved without interpreting the collective-bargaining agreement itself, the claim is independent of the agreement for section 301 pre-emption purposes. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S.Ct. 1877, 1883, 100 L.Ed.2d 410 (1988).

B.

Medrano's claim against Excel was for wrongful discharge under article 8307c of the Texas Workmen's Compensation Act, which provides in part:

> Protection of claimants from discrimination by employers; remedies; jurisdiction
>
> Section 1. No person may discharge or in any other manner discriminate against any employee

> because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Tex.Rev.Civ.Stat.Ann. art. 8307c, Acts 1971, 62nd Leg.p.884, ch. 115. In a case pursuant to article 8307c, the employee bears the initial burden of establishing a causal link between the discharge and the workers' compensation claim. *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 562 (5th Cir. 1992). Retaliation only needs to be a determining factor for discharge to permit an employee to recover under article 8307c. *Id.* Once the employee has established the causal link, the employer must rebut the alleged discrimination by showing a legitimate reason for the discharge. *Id.*

C

In this case we are asked to "determine if (Medrano's) claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of section 301." *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 85, 859, 107 S.Ct. 2161, 2167, 95 L.Ed.2d 791 (1987).[2] We

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[2] We quickly dismiss of Medrano's argument that Excel did not preserve this issue for appeal. Excel moved for a directed verdict at the close of Medrano's evidence, and also argued in its motion for JNOV or new trial that Medrano's claim was pre-empted by section 301. Therefore, Excel "properly preserved the issue" of pre-emption for appeal. *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d. 1023, 1028 (5th Cir. 1992).

conclude that it is not. Although this holding may at first appear somewhat at odds with our holdings in *Jones v. Roadway Express, Inc.* (*Roadway Express I*), 931 F.2d 1086 (5th Cir. 1991), and *Jones v. Roadway Express, Inc.* (*Roadway Express II*), 936 F.2d 789 (5th Cir. 1991), and the Supreme Court's holding in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), an examination of the cases demonstrates the distinction. The state-law claim in *Roadway Express I*, as in the instant case, was based on article 8307c. In *Roadway Express I*, we stated that "the basic issue in this case is whether a retaliatory discharge occurred" and concluded that "[r]esolution of this issue does not require an interpretation of the CBA." *Roadway Express I*, 931 F.2d at 1090. We held that because the retaliatory discharge claim was not "inextricably intertwined" with the CBA and did not depend upon a provision of the CBA, the state law claim was not preempted. *Roadway Express II*, 936 F.2d at 792. Furthermore, we observed that in the "typical case" involving such a retaliatory discharge, the claim could be resolved without an interpretation of the CBA. *Id.*

The case before us today, however, is not a typical straightforward case alleging a retaliatory discharge in violation of article 8307c. Unlike the plaintiff's claim in *Roadway Express I and II*, Medrano's claim is indeed inextricably intertwined with a consideration of the terms of the CBA. Medrano actually drew on the settlement provision of the CBA itself to establish a violation of article 8307c. Medrano's claim is distinctive in that he alleged Excel -- by applying a specific provision of the CBA -- discriminated against him because he *settled* a workers' compensation claim, not because he *filed* one. Throughout trial, Medrano drew a distinction between those employees who filed a workers' compensation claim but did not settle (not discharged), and those who filed a claim but did settle (discharged). Medrano was essentially challenging the very legality of Article XVII, Section 11(F) of the CBA, which

Excel had faithfully applied and which was the basis for Medrano's termination. Medrano's claim, without a doubt, is substantially dependent upon the meaning of a term of the CBA and its applicability in this case.

In *Lingle* the Court concluded that the "purely factual questions" necessary to show retaliatory discharge in that case "pertain[ed] to the conduct of the employee and the conduct and motivation of the employer." *Lingle*, 486 U.S. at 407, 108 S.Ct. at 1882. The Court reasoned that the plaintiff's state law retaliatory discharge claim was independent of the CBA because "resolution of the state-law claim [did]not require construing the collective-bargaining agreement." *Id.* To the contrary here -- and we repeat ourselves -- Medrano's claim clearly requires construing the CBA. The unquestioned basis of Excel's discharge of Medrano was the settlement provision of the CBA; that point is not in dispute. What is disputed in this case is whether the *provision itself* was illegal or discriminatory. Unlike the facts presented in *Lingle*, here the CBA must be construed for resolution of Medrano's state law claim. "No matter in what glamorous garb it is dressed, the basic thrust" of Medrano's claim is that the enforcement of the settlement provision of the CBA "itself constitutes a tort under state law." *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985).[3]

At trial, Medrano acknowledged that he was discharged pursuant to the settlement provision of the CBA, but argued that this provision itself constituted discrimination against employees who settle their claims. In essence, Medrano's claim was that Article XVII, Section 11(F), of the

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[3] We find our recent decision in *Bagby v. General Motors Corp.*, 976 F.2d 919 (5th Cir. 1992), to be applicable to this case. In *Bagby* we concluded that when a plaintiff "asserts that acts unquestionably taken in accordance with the provisions of the CBA were nonetheless tortious," such "claims will obviously require an interpretation of the CBA." *Id.* at 921-22.

CBA was an admission by Excel that it discriminated against Medrano in violation of article 8307c because this section of the CBA allowed Excel to discriminate against any workers' compensation claimant who settled his claim while Excel was unable to accommodate him at work. Throughout the trial, Medrano referred to this provision of the CBA and attempted to show the jury that Excel discriminated not only against Medrano individually but against any employee who settled a workers' compensation claim as opposed to an employee who did not.

Medrano's attorney began his attack on the settlement provision of the CBA during voir dire[4], and his challenge to the CBA continued during opening statements. Medrano called six witnesses, three of whom were questioned extensively about the terms of the CBA. Excel called only three witnesses, but on cross-examination Medrano's attorney again concentrated on the terms of the CBA. Even during his closing arguments, Medrano's attorney's emphasis was on the CBA. Medrano was not challenging the actions of his employers under section 8307c; instead, he was challenging a provision of the CBA that was applied by his employer. Because the solution of Medrano's claim required an interpretation of the CBA, his claim was clearly pre-empted by section 301.

REVERSED.

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[4] Medrano's attorney told prospective jurors that "[y]ou are going to be asked to consider whether this rule [Article XVII, Section 11(F)] violates the law, and I think the evidence will show plainly it does. And I ask you, just because there was a union contract involved where they managed to get it in the contract, that would it keep you from fairly considering the *issue* at hand, which is *whether that rule discriminates* against employees that settle claims." (Emphasis added.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MIGUEL MEDRANO	§	
	§	
v.	§	NO. CA5-91-080-C
	§	
EXCEL CORPORATION	§	

ORDER

On this day came to be considered Defendant's Motion for Judgment Notwithstanding the Verdict. After considering the Motion the Court finds that the Motion should be **Denied**.

It is so ordered.

Nov. 26, 1991 /s/ Sam R. Cummings
JUDGE PRESIDING